

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



April 15, 2005

TO: PARTIES OF RECORD IN INVESTIGATION 03-09-030

This proceeding was filed on September 20, 2005, and is assigned to Commissioner Brown and Administrative Law Judge (ALJ) Patrick. This is the decision of the Presiding Officer, ALJ Patrick.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (*i.e.*, the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (*See*, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ Angela K. Minkin  
Angela K. Minkin, Chief  
Administrative Law Judge

I.03-09-030 ALJ/BDP-POD/avs

ANG:avs  
Attachment

**PRESIDING OFFICER'S DECISION (Mailed 4/15/2005)**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Investigation On The Commission's Own Motion  
Into The Santa Clara Valley Transportation  
Authority's Refusal To File An Application For  
The Widening Of I-880 Over The Authority's  
Light Rail Line At North First Street In The City  
Of San Jose, California, As Required By  
California Public Utilities Code Sections 1201  
*et. seq.* and 99152, And Order To Show Cause  
Why The Authority Should Not Be Ordered To  
File An Application For Commission Approval.

Investigation 03-09-030  
(Filed September 18, 2003)

Benjamin H. Scharf, Attorney at Law,  
for Santa Clara Valley Transportation  
Authority, respondent.

Patrick S. Berdge, Attorney at Law, for Rail  
Crossing Engineering Section.

**OPINION REQUIRING SANTA CLARA TRANSPORTATION  
AUTHORITY TO FILE AN APPLICATION FOR SAFETY  
REVIEW OF FUTURE CONSTRUCTION OR MODIFICATIONS  
OF ITS LIGHT RAIL TRANSIT SYSTEM**

**1. Summary**

Pursuant to Pub. Util. Code<sup>1</sup> § 99152 and General Order (GO) 143-B,<sup>2</sup> the  
Commission orders Santa Clara Valley Transportation Authority (VTA) to file an

---

<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise stated.

application for safety review of future construction and modifications of its light rail transit (LRT) system where requested to do so by Commission Staff . The Commission rejects VTA's contention that under its enabling act<sup>3</sup> and a relatively recent Commission decision in a complaint proceeding,<sup>4</sup> VTA has the threshold authority to determine whether any new construction or modifications of its LRT system, including crossings, sufficiently impacts safety as to justify an

application to the Commission under § 99152.<sup>5</sup> While VTA is free to “construct, own operate, control, or use rights-of-way, rail lines, bus lines, stations,” etc.

---

<sup>2</sup> GO 143-B and its application requirement were expressly established by the Commission to implement its light rail transit safety jurisdiction. Section 1.02 of GO 143-B provides: “These rules and regulations are authorized by and implement the provisions of Sections 778, 29047, 30646, 99152, and 100168 of the Public Utilities Code.” Hence, the GO 143-B application requirement was not implemented pursuant to the Commission's § 1202 exclusive railroad crossing jurisdiction, which as discussed below, does not apply to VTA.

<sup>3</sup> Pub. Util. Code §§ 100000 *et seq.*

<sup>4</sup> *Brown v. Santa Clara Transportation Agency, et al.*, Decision (D.) 94-10-009, 56 CPUC2d 554 (1994).

<sup>5</sup> Section 99152 provides:

*Footnote continued on next page*

(§ 100161(a)), it does so subject to the Commission's statutory safety oversight, and the Commission cannot delegate its authority in this matter.

This proceeding is closed.

## **2. Procedural Summary**

On September 18, 2003, the Commission issued its Order Instituting Investigation (OII) and Order to Show Cause regarding VTA's refusal to file an application with the Commission for the widening of its overpass at North First Street, in the City of San Jose. On October 16, 2003, VTA filed its response to the OII, and appeared at a hearing on that date. On October 28, and November 24, 2003, respectively, VTA and the Commission's Consumer Protection and Safety Division (Staff) filed opening and reply briefs addressing the jurisdiction issue in this proceeding, and this matter was submitted. However, although submission was not formally set aside, issuance of the Commission's decision was deferred pending a decision by the Court of Appeal, Sixth Appellate District, in its docket H026101, on the jurisdiction issue. (*See* "Background" below.)

---

Any public transit guideway planned, acquired, or constructed, on or after January 1, 1979, is subject to regulation of the Public Utilities Commission relating to safety appliances and procedures.

The commission shall inspect all work done on those guideways and may make further additions or changes necessary for the purpose of safety to employees and the general public.

The commission shall develop an oversight program employing safety planning criteria, guidelines, safety standards, and safety procedures to be met by operators in the design, construction, and operation of those guideways. Existing industry standards should be used where applicable.

### 3. Background

The OII sets forth two independent statutory sources of jurisdiction as the basis for Commission review of VTA's proposed construction at this crossing: (1) § 1202, and (2) § 99152. After the OII was issued, in a separate proceeding (Application (A.) 01-01-003) involving another VTA crossing and the same jurisdiction issue, the Court of Appeal, Sixth Appellate District, in its decision filed on November 22, 2004, in docket H026101, held "Under the circumstances, we find that §§ 1201 and 1202 do not apply to the VTA. Therefore, while the Commission has safety jurisdiction over the VTA's light rail transit crossing under § 99152, the Commission does not have exclusive railroad crossing jurisdiction over these crossings pursuant to §§ 1201 and 1202." (*Id.* p. 21.)<sup>6</sup> Accordingly, the Commission has, in this proceeding, taken official notice of the Court of Appeal's ruling.

### 4. Discussion

We hold that a transit agency such as VTA must apply for safety review of LRT crossings whenever requested to do so by Commission Staff. We reject VTA's suggestion that the Commission itself must first make a *prima facie* determination upon the request of Staff that a safety issue exists, and if the Commission finds there is a safety concern, then issue an OII under § 309.7 to compel the LRT system authority to file an application for safety review. Such a procedure is cumbersome, time-consuming, and unworkable. Notwithstanding VTA's reluctance to file an application for safety review in cases where it has

---

<sup>6</sup> *Santa Clara Valley Transportation Authority v. Public Utilities Com.* 124 Cal. App. 4<sup>th</sup> 346, 21 Cal. Rptr. 3d 270, rehearing denied (2004 Cal. App. LEXIS 2289, Dec. 14, 2004), review denied (2005 Cal. LEXIS 2855, March 16, 2005).

determined there are no safety issues, we point out that unless Staff disputes the safety of the planned crossing, the application is likely to be uncontested and will be promptly approved as such. Furthermore, the Commission has the discretion to determine how best to administer its statutory mandate, and the application procedure under GO 143-B was expressly devised to carry out that mandate. (See note 2 above.)

VTA acknowledges that the Commission has the authority to object to the design, construction or operation of an LRT facility, including a crossing, which is, or becomes, unsafe. However, VTA contends that unlike its power over private rail corporations, the Commission has no right to tell local transit districts where or how to construct their LRT systems. VTA's concern seems to be that (in requiring the filing of an application), the Commission is seeking to expand its safety oversight authority under § 99152, to assume the same exclusive jurisdiction over the placement and construction of entire LRT systems as it has over privately-owned railroad and street railroad corporations under §§ 1201-1205. (See VTA's petition to the Court of Appeal for writ of review and request for stay of proceedings p. 19.) We assure VTA, the Commission has no interest in telling VTA where or how to construct its crossings, unless, upon review, it appears to Staff there is a safety concern which it is required to bring to VTA's attention.<sup>7</sup> VTA's fears that the Commission is attempting to assert authority beyond its safety jurisdiction under § 99152 are unfounded, and this case does not concern assertion of jurisdiction by the Commission beyond safety.

---

<sup>7</sup> For example, see A.01-01-003, VTA's proposed Hamilton Avenue crossing application, where Staff objected to VTA's proposal for an at-grade crossing at this location because

*Footnote continued on next page*

The filing of an application by a LRT system operator does not suggest, one way or the other, that there are safety issues associated with the project the application concerns. As pointed out by Staff, the filing of an application simply triggers the Commission's oversight over such construction. As stated in Rule 39, "(w)hen the political subdivision or governmental authority having jurisdiction desires to widen, relocate, or otherwise alter an existing crossing, the application shall show the information required by Rule 38." (20 C.C.R. § 39 of the Commission's Rules of Practice and Procedure.) The transit system's filing of the application will result in the determination by Staff as to whether safety requires "further additions or changes necessary for the purpose of safety to employees and the general public." (§ 99152.) As Staff says, if VTA is truly concerned that it would have to file an application for every modification to its transit line, it need only contact Staff to ask if an application is necessary. Here, VTA was repeatedly asked and cautioned by Staff to file an application for a significant modification to its transit line.

Further, we disagree with VTA's argument that under its enabling act and *Brown* (note 4 above), VTA has the threshold authority to determine whether new construction or modifications of a LRT system, including crossings, sufficiently impacts safety as to justify an application to the Commission under § 99152. While VTA is free to "construct, own, operate, control, or use rights-of-way, rail lines, bus lines, stations," etc. (§ 100161(a)), it does so subject to the Commission's statutory safety oversight. Section 99152 specifically requires that "the commission shall enforce the provisions of this section, and the

---

of public safety concerns, whereupon VTA abandoned its plan to cross at grade and decided to cross Hamilton Avenue by an aerial grade separation.



Commission “inspect all work done on those guideways and may make further additions or changes necessary for the purpose of safety to employees and the general public.” Not only is the Commission barred from delegating its safety oversight by statute,<sup>8</sup> as a matter of public policy, this prohibition against self-regulation is appropriate.

As support for its contention that the Commission’s safety jurisdiction is limited, VTA relies on *Brown*, stating that the Commission in this decision provided “that its approval under § 99152 was not necessary for changes which did not involve safety appliances or procedures.” VTA misconstrues *Brown*. The facts in *Brown*,. concerned a demand by complainants that the Santa Clara County Transportation Agency install edge detection strips plus tactile warning and guidance materials for the visually impaired. *Brown* never held, as VTA would have it, that the Commission’s transit safety jurisdiction was limited to “safety appliances and procedures”; nor does the decision contemplate such a holding. As to VTA’s refusal to file an application for the North First Street project, we have here addressed the legal issue presented and conclude that VTA should have filed an application with the Commission for safety review of the proposed modifications to this crossing before construction was commenced.

As matters now stand, construction is complete at the crossing. We are pleased that VTA provided Staff with construction plans and the necessary

---

<sup>8</sup> The California Legislature has delegated safety oversight of public transit guideway systems to the Commission in response to Title 49 Code of Federal Regulations (CFR) Part 659.1. “This part implements 49 U.S.C. 5330 by requiring a State to oversee the safety of rail fixed guideway systems through a designated oversight agency.” (49 CFR Part 659.1.) *See also* Cal. Pub. Util. Code §§ 100000 *et seq.* establishing the Santa Clara County Transit District.

California Environmental Quality Act documentation for the Commission to fulfill its duties as a responsible agency. Also, Staff has inspected the project and, there are no safety issues remaining. Therefore, we conclude that no useful purpose would be served by requiring VTA to file an application for this project at this time. However, in the future, we expect VTA to consult Staff on all new projects and file an application if requested to do so by Staff. If there is a safety issue, there would be an evidentiary hearing, VTA would have the opportunity to present its case, and the Commission would then issue its decision on the safety issue.

## **5. Procedural Matters**

We affirm the Commission's preliminary determination that this is an adjudicatory proceeding, and the Commission's rules for *ex parte* contacts should apply.

## **6. Assignment of Proceeding**

Geoffrey F. Brown is the Assigned Commissioner and Bertram D. Patrick is the assigned Administrative Law Judge and presiding officer in this proceeding.

## **Findings of Fact**

1. This OII was issued for the purpose of investigating VTA's refusal to file an application with the Commission for widening the I-880 overpass at North First Street in the City of San Jose over VTA's LRT line.

2. The OII, as issued, sets forth two independent statutory sources of jurisdiction as the basis for review of VTA's proposed construction: (1) § 1202, and (2) § 99152.

## **Conclusions of Law**

1. While the Commission has safety jurisdiction over the VTA's light rail safety appliances and safety procedures (including transit crossings) under

§ 99152, the Commission does not have exclusive railroad jurisdiction over these crossings pursuant to §§ 1201 and 1202. The OII should be narrowed accordingly.

2. Under the Commission's § 99152 authority, as reflected in GO 143-B, VTA is required to file an application for safety review of any proposed widening of its transit line crossings before it commences construction.

3. The Commission's safety authority under § 99152 does not permit VTA to decline to file an application for safety review of a LRT construction project when requested to do so by Staff, even if VTA determines and thereafter asserts that there is no safety issue.

4. Since construction has been completed and there are no safety issues remaining, no useful purpose would be served by requiring VTA to file an application for safety review of its overpass widening project over its LRT line at North First Street, in the City of San Jose.

5. In the future, VTA shall file an application for safety review for all new construction or modification to its LRT system crossings, when requested to do so by Staff.

## **O R D E R**

Therefore, **IT IS ORDERED** that:

1. Santa Clara Valley Transportation Authority shall file an application pursuant to § 99152, for safety review of all new construction or modifications to its light rail transit line crossings, when requested to do so by Staff.

2. Investigation 03-09-030 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.